IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 25 of 2001
in
COMPANY PETITIONNo 186 of 2000
with
CIVIL APPLICATION No 171 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THE WELDING RODS PVT. LTD.

Versus

INDO BORAX & CHEMICALS LTD.

Appearance:

1. O.J.APPEAL No. 25 of 2001
MR ASHWIN L SHAH for Petitioner No. 1
MR AS VAKIL for Respondent No. 1

2. CIVIL APPLICATION No. 171 of 2001
MR ASHWIN L SHAH for Petitioner No. 1
MR AS VAKIL for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and

MR.JUSTICE D.A.MEHTA

Date of decision: 28/12/2001

CAV JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This is an appeal against the judgment and order dated 20.7.2001 passed by the learned Company Judge overruling the preliminary objections raised by the appellant-Company to the maintainability of the winding up petition (Company Petition No. 186 of 2000) filed by the present respondent.

2. The facts leading to filing of this appeal, briefly stated, are as under :-

The present respondent (hereinafter to be referred to as `the petitioning-creditor' or `the original petitioner') has filed Company Petition No. 186 of 2000 for winding up of the appellant-Company under the provisions of Sections 433, 434 and 439 of the Companies Act, 1956 (hereinafter to be referred to as `the Act'). Upon service of notice, the appellant-Company appeared and filed affidavit in reply dated 28.2.2001 raising the following preliminary contentions :-

(i) There is no resolution for institution of winding up proceedings against the respondent Company by the petitioning company;

(ii) Mr S.L. Jain who has filed an affidavit in support of the petition was not authorized to initiate and/or institute the winding up petition. So, there is no winding up proceedings in the eyes of law which can be said to have been instituted;

(iii) Duly Constituted Attorney or the Authorized Person of the petitioner Company has not signed the Company Petition, though it is mandatory, according to the form prescribed under the relevant rules;

(iv) The affidavit filed in support of the winding up petition is not an affidavit in the eyes of law or in accordance with Rule 21 of the Company (Court) Rules, 1959 (hereinafter referred to as `the

Rules').

3. After hearing the learned counsel for both the parties, and after considering the resolution dated 28.6.2000 passed by the Board of Directors of the petitioning-creditor, the learned Company Judge by order dated 20.7.2001 overruled the objections in as much as the learned Company Judge came to the conclusion that the irregularity in the verification of the affidavit and want of signature below the petition and above the verification were the irregularities which were required to be permitted to be cured and the learned Company Judge accordingly afforded an opportunity to the appellant-Company to sign the petition and remove all technical objections within a period of 15 days from the date of the order. The original petitioner availed of the said opportunity.

The present appeal came to be filed on 13.8.2001. Thereafter the hearing of the appeal came to be adjourned from time to time at the request of the learned counsel for the parties. On 2.11.2001, the learned counsel for the original petitioner submitted the affidavit dated 31.10.2001 of Mr Sushil Kumar Jain, a Director of the petitioning-creditor stating that at the meeting of the Board of Directors of the petitioning-creditor held on 12.10.2001 a resolution came to be passed clarifying the resolution dated 28.6.2000 produced in the Company Petition. Thereafter the learned counsel for the parties were heard at length on all the facets of the dispute which is the subject matter of this appeal. The appeal is being finally disposed of by this judgment.

4. At the outset, it was pointed out to Mr Ashwin Lalbhai Shah, learned counsel for the appellant-Company to satisfy the Court whether the present appeal is maintainable under Section 483 of the Companies Act, 1956 because all that the learned Company Judge has prima facie done is to pass a procedural order permitting the petitioner to remove certain defects in verification of the affidavit and to put the signature of the petitioner at the foot of the petition above the verification clause. Section 483 of the Act reads as under :-

"483. Appeals from any order made, or decision given, in the matter of the winding up of a Company by the Court shall lie to the same Court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction."

5. In Shankarlal Agarwal vs. Shankarlal Poddar, 35 Comp. Cases 1 = AIR 1965 SC 507, the Apex Court has held that an appeal under Section 483 of the Companies Act, 1956 is maintainable against an order which affects the rights or liabilities of parties, but not against mere procedural orders in the course of the winding up proceedings. The attention of the learned counsel was also invited to the judgment dated 4.9.2001 of this Court in O.J. Appeal No. 24 of 2001 (Horst Kurves GMBH vs. Essar Oils Ltd.).

6. Mr Ashwin Lalbhai for the appellant submitted that the adjudication by the learned Company Judge does affect the rights of the appellant-Company because if the appellant's contentions were upheld by the learned Company Judge, and the winding up petition were held to be not maintainable, the same would have been dismissed.

7. However, since the discussion on the question whether the order under challenge is merely a procedural order or whether it affects the rights of the parties also involved consideration of the arguments on the merits of the subject matter of the appeal, we heard the learned counsel for the parties on all the facets of the controversy involved in the appeal. We, therefore, proceed to deal with the contentions raised by the learned counsel for the appellant-Company which are repetition of the preliminary objections which were raised before the learned Company Judge.

Contention Nos. (i) and (ii)

(i) At the time of institution of the petition, there was no resolution for institution of winding up proceedings against the respondent Company by the petitioning company. Hence, the petition was not at all maintainable. The defect could not have been subsequently cured.

(ii) Mr S.L. Jain who has filed an affidavit in support of the petition was not authorized to initiate and/or institute the winding up petition. So, there is no winding up proceeding in the eyes of law which can be said to have been instituted.

8. In the affidavit in reply to the winding up petition, the appellant-Company raised the above interconnected contentions on the ground that no resolution for filing the winding up petition appeared to have been passed by the Board of Directors of the petitioning-creditor and that there was no averment in the petition as to whether any such resolution was passed. Hence, alongwith the rejoinder affidavit filed on behalf of the petitioning-creditor, a copy of the resolution dated 28.6.2000 passed by the Board of Directors of the petitioning-creditor at the Registered Office of the Company was produced at Annexure "I". Certified true copy of the said resolution read as under:-

"Certified True Copy of the resolution passed by the Board of Directors of M/s Indo Borax & Chemicals Ltd. in the meeting held on 28th June, 2000 at the Registered Office of the Company.

The Chairman informed the Board that the Company need to initiate legal proceedings against some of the Customers who have defaulted in making payment and requested the members to authorize Shri S.L. Jain to do the needful in the matter. The matter was discussed and following resolution was passed :-

"RESOLVED THAT Shri S.L. Jain, be and is hereby authorized to represent the Company in any legal proceedings before any Court of Law or any other authority or forum in any law-suit or other legal proceedings, initiated or filed by or against the Company and to affirm, sign or execute any documents, Agreement, Papers, Statements, Correspondences, Verify applications, Complaints, Affidavit and to appoint/engage advocates for institution of legal proceedings or to appear before any court of law to proceed/prosecute and also do all the acts which are required in the matter and the Company agrees to ratify and confirm the above action whatsoever Shri S.L. Jain do lawfully or cause to be done by virtue of this resolution.

CHAIRMAN"

9. The learned Company Judge held that the

resolution has to be interpreted in the context of the agenda proposed and the proposal put forward by the Chairman before the members of the Board. The Chairman had impressed upon the Board members the need for the Company to initiate "legal proceedings against those who have defaulted in making payment" and requested the members to authorize Mr S.L. Jain to do the needful in the matter. If Mr Jain in light of the statutory notice already served on the respondent-Company approaches a lawyer and in turn he is advised to initiate winding up proceedings, in that event the initiation of proceedings by Mr Jain on the advice of a lawyer cannot be said to be initiation of proceedings without the consent or assent of the Board of Directors or without the authority conferred on him. After making the aforesaid observation, the learned Company Judge made the following observations in para 3.2 of the order :-

"3.2 Respondent Company, even if has a slightest doubt in its mind that Board of Directors might not have decided to institute a winding up proceedings - ... ..., then in that event, the petitioner Company can be asked to tender clarificatory further resolution."

10. Thereafter Mr Sushilkumar Jain, a Director of the petitioning-creditor filed the affidavit dated 31.10.2001 stating as under :-

"I state that I am also on the Board of Directors of Indo Borax & Chemicals Limited. I state that at the meeting held on 12.10.2001 of the Board of Directors of Indo Borax & Chemicals Limited at which I was personally present, a resolution came to be passed clarifying the resolution dated 28.06.2000 produced in the captioned Company Petition No. 186 of 2000."

The said resolution reads as under :-

"CERTIFIED TRUE COPY of the resolution passed by the Board of Directors of M/s Indo Borax & Chemicals Limited in the meeting held on 12th October, 2001 at the Registered Office of the Company.

The Chairman informed the members that :

Pursuant to the resolution dated 28.06.2000, Indo Borax & Chemicals Limited, had initiated proceedings for winding up, against the "Welding Rods Pvt. Ltd.", in the Gujarat High Court at Ahmedabad. The said proceedings are numbered Company Petition No. 186 of 2000. However, the said resolution dated 28.06.2000 were worded in general terms :

After discussion, following resolution was passed unanimously :-

"RESOLVED THAT in continuation of the resolution passed in the meeting held on 28.06.2000, it be and is hereby clarified that the said resolution did intend to authorize institution of proceedings for winding up under the provisions of the Companies Act, 1956 against the Welding Rods Pvt. Ltd. and the winding up petition (No. 186 of 2000) filed by Indo Borax & Chemicals Limited against the said Welding Rods Pvt. Ltd., in the High Court of Gujarat at Ahmedabad did have the necessary authorization of the Board of Directors of Indo Borax & Chemicals Limited vide the said resolution dated 28.06.2000.

CHAIRMAN"

11. Mr Ashwin Lalbhai Shah, learned counsel for the appellant Company has, however, vehemently submitted that the resolution dated 12.10.2001 passed after the learned Company Judge passed the order dated 20.7.2001 - or for that matter after filing of the winding up petition cannot cure the initial defect as the winding up petition originally filed was not maintainable for want of a proper resolution of the Board of Directors of the petitioning-creditor to institute a winding up petition against the present appellant Company. Since the petition was not maintainable and was liable to be dismissed at the threshold, such subsequent resolution dated 12.10.2001 cannot revive the stillborn petition. The learned counsel for the appellant-Company relied on several decisions in support of his contention Nos. (1) and (ii), referred to hereinafter.

11.1 Reliance is placed on the decisions of the Delhi High Court in Nibro Ltd. vs. National Insurance Co. Ltd., (1991) 70 Company Cases 388, and in Ferruccio Sias vs. Jai Manga Ram Mukhi, (1994) 1 Comp.LJ 345 wherein the Court has held that it it well settled that under section 291 of the Companies Act, 1956, except where

express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting, in all other cases the board of directors are entitled to exercise all its powers. Individual directors have such powers only as are vested in them by the memorandum and articles. It is true that ordinarily the court will not non-suit a person on account of technicalities. However, the question of authority to institute a suit on behalf of a company is not a technical matter. It has far-reaching effects. Order 29, rule 1 of the Code of Civil Procedure, 1908, does not authorize persons mentioned therein to institute suits on behalf of a Corporation - it only authorizes them to sign and verify the pleadings on behalf of the Corporation. thus, unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Such power can be conferred by the board of directors only by passing a resolution in that regard.

11.2 Strong reliance is also placed on the decision of the Bombay High Court in Shantilal Khushaldas & Bros. vs. Smt. Chandanbala Sughir Shah, (1993) 77 Company Cases 253 wherein it has been held that proceedings for winding up under section 433 of the Companies Act can by no stretch of imagination be equated to suits or for that matter suits for recovery of money. In winding up proceedings the lis is not between the petitioning party and the company sought to be wound up. Once the petition is admitted, the creditors, contributories, shareholders, etc., seek redress in the proceedings and even oppose the winding up. The company is directed to be wound up depending upon a case made out whereupon the assets are taken over and distributed in accordance with the provisions of the Companies Act and the Rules. A suit for recovery of money is essentially a suit between the parties where no third party can seek any indulgence or impleadment. A constituted attorney must be specifically authorized to lodge company petitions for winding up a company. A mere authorization to file suits or proceedings for recovery of amounts is not sufficient to empower him to institute proceedings under the Companies Act for winding up the company.

11.3 Mr Shah also cited the decision of the Madras High Court in K.N. Shankaranayanan vs. Shree Consultations & Services Pvt. Ltd., (1994) 80 Company Cases 558 wherein it is held that the question of authority to institute a suit on behalf of a company is not a technical matter. Unless power to institute a suit is specifically conferred on a particular director, he

has no authority to institute a suit on behalf of the company. Such power can be conferred by the board of directors only by passing a resolution in that regard. A letter of consent to file a petition under sections 397 and 398 of the Companies Act can never be said to be a matter of administrative or ministerial character like verifying or signing a pleading. The decision must be taken by a resolution of the board of directors of the company on whose behalf the letter of consent is to be issued. It cannot be done by an individual director or the secretary of the company unless he is so authorized by a board resolution to issue such letter of consent for the presentation of a petition under sections 397 and 398 of the Companies Act, 1956, by the company. Any case instituted without authority makes it invalid from its inception and cannot be validated by a later ratification.

11.4 Mr Shah also relied on the decision of the Patna High Court in BOC India Ltd vs. Zinc Products and Co. Pvt. Ltd., (1196) 86 Company Cases 358 and particularly on the following observations :-

"In Nibro Ltd. vs. National Insurance Co. Ltd. (1991) 70 Comp Cas 388; AIR 1991 Delhi 25, it has been held that although ordinarily the court ought not to unsuit a person on account of technicalities, the question of authority to institute a suit on behalf of a company is not a technical matter. It has far-reaching effects. It often affects policy and finance of the company. Thus, unless a power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Such a power can be conferred by the board of directors only by passing a resolution in that regard. ... ...The defect in the application goes to the root of the matter and is not curable. As the Delhi High Court has held in the above mentioned case even a subsequent authorisation/ratification by the board of directors cannot cure the defect."

11.5 Further reliance has been placed on the decision in Punjab State Co-operative Bank Ltd. vs. Milkha Singh, (1997) 89 Company Cases 696 wherein the Punjab & Haryana High Court followed the decision of the Delhi High Court in Nibro Ltd. vs. National Insurance Co. Ltd. (Supra) and made the following observations :-

"The Punjab State Cooperative Bank is a body corporate registered under the Punjab Co-operative Societies Act, and it functions through its managing director and other officers. The managing director is a principal officer of the society but there must be a decision of the body corporate/board of directors authorizing the managing director to file an appeal. The decision whether to file an appeal or not rests with the board of directors which is heart and soul of the bank. While the regulations of the bank give powers to the managing director to institute, conduct, defend any legal proceedings by or against the bank, the decision to institute or defend the proceedings has to be taken by the body corporate for functions of its managing director. In the absence of that decision of the board of directors, an appeal filed by the managing director alone would not be competent and maintainable. In the Punjab Co-operative Societies Act, there is no provision which independently confers powers on the managing director to take a decision for the institution of the legal proceedings without the prior approval of the board of directors."

12. On the other hand, Mr AS Vakil, learned counsel for the petitioning-creditor (the present respondent) has relied on the decisions of the Bombay High Court in Western India Theatres Ltd. vs. Ishwarbhai Somabhai Patel, AIR 1959 Bom. 386, of the Andhra Pradesh High Court in D & H Secheron Electrodes (P) Ltd. vs. Voltare Electrodes (P) Ltd., (1997) 89 Company cases 592 (AP) and of the Calcutta High Court in State Bank of India vs. The India Electric Works Ltd., (1969) 2 CLJ 169 (Cal.) in support of his contention that the rules of procedure are handmaids of justice and that the rules or forms do not require any resolution of the Board of Directors of the petitioning creditor to be produced nor do the Rules or forms require any power of attorney to be filed. The resolution dated 28.6.2000 was clear enough to authorize Mr SL Jain to file the winding up petition against the appellant-Company and in any case the resolution dated 12.10.2001 passed by the Board of Directors of the petitioning-creditor has sufficiently clarified the matter and put the issue beyond any pale of doubt.

13. Before discussing the rival submissions, we may refer to Rules 6, 9 and 17 of the Companies (Court) Rules, 1959 which read as under :-

"6. Practice and procedure of the Court and provisions of the Code to apply - Save as provided by the Act or by these rules the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these rules or the practice and procedure of the Court.

9. Inherent powers of Court- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

17. Forms - The Forms set forth in Appendix I, where applicable, shall be used with such variations as circumstances may require.

The Act, Rules or forms do not require any resolution to be passed for the purpose of initiating winding up proceedings, even where the petitioning-creditor is a Company with a Board of Directors. Neither the Act, the Rules nor the Forms stipulate that any particular resolution should be passed by the Board of Directors for instituting a winding up petition. The resolution dated 28.6.2000 authorized Mr SL Jain to do all the acts which are required in "any legal proceedings" which did not mean only suits for recovery of money from the defaulting customers. Even if the resolution dated 28.6.2000 was lacking in particulars, all those particulars have been given with sufficient details and clarity in the clarificatory resolution dated 12.10.2001 for passing which the learned Company Judge himself had granted the permission in para 3.2 of the judgment quoted in para 9 hereinabove.

14. Having heard the learned counsel for the parties on the contention whether there is any resolution for institution of winding up proceedings against the appellant-Company by the petitioning-creditor, we hold that the resolution dated 28.6.2000 read with the resolution dated 12.10.2001 passed by the Board of Directors of the petitioning-creditor did authorize filing of the present winding up petition being Company Petition No. 186 of 2000.

15. At this stage, before dealing with the contention vehemently urged by Mr Ashwin Lalbhai Shah for the appellant-Company that as held by the Patna High Court, the Punjab & Haryana High Court and the Madras High Court, even a subsequent authorization/ratification by the Board of Directors cannot cure the technical defect in institution of a suit or a petition, we would like to refer to the decision of a Division Bench judgment of the Bombay High Court in Western India Theatres Ltd., AIR 1959 Bom. 386 which is binding on us.

16. Western India Theaters Ltd. (Supra) before the Division Bench of the Bombay High Court was a case where a winding up petition was filed and the learned Company Judge passed an order for advertising it. During the course of those proceedings, the original petitioning creditor withdrew from the petition and the learned Company Judge made an order substituting in his place Ishwarbhai Somabhai Patel. The respondent Company whose winding up was sought challenged the order in appeal. One of the grounds raised in the appeal was that the winding up petition was not properly presented by the petitioner. The petition was signed by the constituted attorney of the petitioning-creditor - one Mr Tijoriwala in whose favour the petitioner had executed a power of attorney. But the power of attorney was conferred only in respect of the five shares held by Ishwarbhai Somabhai Patel which were sold by Patel to Tijoriwala. Under the Rules of the Bombay High Court, it is only an agent who is the donee of a general power of attorney that can perform any acts or take any proceedings in Court on behalf of his principal. The Court came to the conclusion that the power of attorney executed by Patel in favour of Tijoriwala did not confer power upon the donee with regard to general litigation. Even after upholding the contention of the Company whose winding up was sought (i.e. the appellant before the Division Bench of the Bombay High Court), that the winding up petition was not properly signed by the petitioner, the Court went on to make the following observations :-

> "16. Now, the question is, what is the legal consequence of a petition not being properly signed by the petitioner. In our opinion, this is a mere irregularity which can be cured at any time. That is the view also taken by Mr Justice Baker in the case to which reference has been made by us, and also in Lingangouda Marigouda v. Lingangouda Fakirgouda, 54 Bom LR 829 : (AIR

1953 Bom. 79). We are told that the petitioner himself is present in Court and he is prepared to sign the petition if we direct him to do so. If the petitioner signs the petition, then the flaw which rendered the petition bad or made it not maintainable disappears. The only objection to the petition is that it is signed by an agent who is not a recognized agent. But if the petitioner himself signs it, then no further question arises with regard to the maintainability of the petition. We will therefore direct that the petitioner should sign the petition in Court.

17. Now that the petitioner has signed the petition, the appeal can proceed on merits. We adjourn it to the opening day of the next term."

(emphasis supplied)

17. The facts in the instant case are also on the same lines. The Board of Directors passed the resolution dated 28.6.2000 authorizing Mr SL Jain to institute legal proceedings. Since it was not specified in the resolution whether Mr SL Jain could also institute winding up proceedings against the appellant-Company, in view of the doubt raised by the appellant-Company, by a resolution dated 12.10.2001 the Board of Directors of the petitioning-creditor clarified that this authority was also intended to be conferred upon Mr SL Jain while passing the resolution dated 28.6.2000. The constituted attorney of the petitioning-creditor is accordingly acting on the basis of this resolution for prosecuting the winding up petition against the appellant-Company. The decision of the Division Bench of the Bombay High Court in Western India Theatres' case (Supra) makes it clear that whenever there is any doubt about the authority of the agent who instituted the legal proceedings, the principal himself or itself should be given an opportunity to remove the doubt, if any, regarding the authority of the agent. Since in the instant case, the principal is a limited Company, there is no question of the limited Company itself signing the winding up petition in person. Permitting the petitioning-creditor to produce on record the clarificatory resolution dated 12.10.2001 would, therefore, be in accordance with the aforesaid principle adopted by the Bombay High Court in the case of Western India Theatres Ltd. (Supra).

18. At this stage, we would also like to refer to the decision of the Apex Court in Everest Coal Co. Ltd. vs.

State of Bihar, AIR 1977 SC 2304 wherein the question was about the legality of the proceedings filed by a party against the receiver without leave of the Court but the leave is obtained subsequently. In the said decision, the Apex Court observed as under :-

"Equally clearly, prior permission of the Court appointing the Receiver is not a condition precedent to the enforcement of the cause of action. Nor it is so grave a vice that later leave sought and got before the decree has been passed will not purge it. If, before the suit terminates, the relevant Court is moved and permission to sue or to prosecute further is granted, the requirement of law is fulfilled. Of course, failure to secure such leave till the end of the lis may prove fatal.

This, in short, is the law which has been stabilised by Indian decisions although inherited from principles of English law. In a sense Indian, English and even American jurisprudence lend support to this law." ... ...

"This infirmity does not bear upon the jurisdiction of the trying Court or the cases of action. It is peripheral."

The aforesaid principle was followed by this Court, speaking through Hon'ble Mr Justice B.K. Mehta, in Shanabhai Mathurbhai Patel vs. M.A. Panchal, 1979 GLR 20 wherein the Court was concerned with the provisions of Section 481(1)(h)(i) of the Bombay Provincial Municipal Corporations Act, 1949 which read as under :-

"481.(1) The Commissioner may -
(h) with the approval of the Standing Committee ... ...
(i) with the like approval, institute and prosecute any suit ... ..."

After referring to the aforesaid principle laid down by the Apex Court in Everest Coal Co. Ltd. (Supra), this Court dealt with the contention which was urged on behalf of the appellant-defendant that prior approval of the Standing Committee was a condition precedent. The Court negatived that contention and held that the Legislature has prescribed the approval which

can be prior approval or post-facto approval and there is no warrant either explicit or inherent for inferring that the approval should be as a matter of fact prior to the filing of the suit and, therefore, a condition precedent.

19. In view of the aforesaid decisions of the Apex Court and of this Court, there is no manner of doubt that even if a specific resolution of the Board of Directors of the petitioning-credit Company was required for instituting the winding up petition against the appellant Company, subsequent resolution dated 12.10.2001 passed by the Board of Directors of the petitioning-creditor Company (the respondent herein) constitutes sufficient authority for the constituted attorney to proceed further with the winding up petition.

20. In BOC India Ltd vs. Zinc Products and Co. Pvt. Ltd., (1996) 86 Company Cases 358 after referring to the observations of the Delhi High Court in Nibro Ltd. (Supra) to the effect that unless a power to institute a suit is specifically conferred on a particular Director, he has no authority to act on behalf of the Company and that such a power can be conferred by a the Board of Directors only, the Patna High Court went on to observe as under :-

> "The defect in the application goes to the root of the matter and is not curable. As the Delhi High Court has held in the abovementioned case even a subsequent authorisation/ratification by the board of directors cannot cure the defect."

In view of the abovequoted observation of the Patna High Court, we have again carefully gone through the decision of the Delhi High Court in Nibro Ltd. 70 Comp. Cases 388. We are unable to find any observation in the judgment of the Delhi High Court in Nibro Ltd. (Supra) to support the inference drawn by the Patna High Court that the Delhi High Court has held that even a subsequent authorisation/ratification by the Board of Directors cannot cure the defect. In the Nibro case, the Delhi High Court has not laid down or even whispered any such principle.

21. In Punjab State Co-operative Bank Ltd. vs. Milkha Singh (1997) 89 Comp.Cases 696, the learned Single Judge of the Punjab & Haryana High Court went to the extent of saying that if the Board of Directors had passed a resolution deciding to file an appeal against the plaintiff, still such resolution could not revive the non-maintainability of the first appeal which was bad for

want of the resolution of the Board of Directors; in other words, the dead horse could not be revived by flogging. The Court relied on the decision of the Delhi High Court in Nibro Ltd. (Supra).

Apart from the fact that the decision of the Punjab & Haryana High Court turned on the question of interpretation of the provisions of the Punjab Co-operative Societies Act and the bye-laws of the Punjab State Co-operative Bank, the Court showed concern for unauthorized expenditure which would be incurred by an officer if the Board of Directors did not want to file the appeal in question or any such legal proceeding.

In the instant case, the Board of Directors of the petitioning-creditor was concerned about its outstanding dues and wanted legal proceedings to be initiated against its defaulting customers, and therefore, the resolution dated 28.6.2000 was already passed intending to authorize its named officer to institute any legal proceedings.

We do not see any reason why the petitioning-creditor should not be allowed to cure the vagueness, if any, in the resolution of the Board of Directors in such matters. A creditor has several remedies against its debtors. The Board of Directors may pass a resolution authorizing its director/officer to resort to all or any of the remedies as may be advisable to the creditor as per legal advice. There is nothing in the provisions of the Companies Act or the Indian Contract Act prohibiting the delegation of the power to take any decision as regards the remedies to be pursued by the constituted attorney or the authorized agent against a defaulting debtor. In case the Board of Directors is of the view that its constituted attorney or authorized agent has gone beyond the authority conferred on him, there is nothing to prevent the Board of Directors from withdrawing the authority and making a proper representation before the appropriate forum where the attorney/agent has filed proceedings beyond the authority delegated or contemplated by the Board of Directors.

22. In K.N. Shankarnarayanan (1994) 80 Comp.Cases 558, the Madras High Court was concerned with a petition under Sections 397 and 398 of the Companies Act. It is obvious that these proceedings are for prevention of oppression and mismanagement and are to be initialled by shareholders of the same Company having the requisite shareholding against the persons in management of the

Company. Rule 88 of the Companies (Court) Rules, 1959 requires that the letters of consent signed by the members authorizing the petitioner to present the petition under Sections 397/398 must be annexed to the petition. Filing of a winding up petition by the creditor-Company against an outsider Company - the debtor company is a different matter altogether. The Act or the Rules do not require any such resolution to be annexed to the petition. The rationale discussed in the preceding paragraphs of this judgment is sufficient to accept the principle canvassed by Mr Vakil for the respondent (original petitioning-creditor).

23. A learned Single Judge of the Bombay High Court in Shantilal Khushaldas & Bros. Pvt. Ltd. vs. Smt. Chandanbala Sughir Shah, (1993) 77 Company Cases 253 has held that a constituted attorney must be specifically authorized to lodge company petitions for winding up a company and mere authorization to file suits or proceedings for recovery of amounts is not sufficient to empower him to institute proceedings under the Companies Act for winding up the company.

In the instant case the resolution dated 28.6.2000 passed by the Board of Directors of the petitioning-creditor did not merely confer authority to file suits for recovery of amounts but it did authorize its constituted attorney to institute "any legal proceedings" which would include the winding up petition. The doubt, if any, in this behalf has been clearly dispelled by the resolution dated 12.10.2001 passed by the Board of Directors. For the reasons already indicated, we do not see any reason why this subsequent resolution should not be looked into for finding out the intention of the Board of Directors of the petitioning creditor.

24. As regards the submission of Mr Ashwin Lalbhai Shah for the appellant-Company that Mr SL Jain who had filed the winding up proceedings was not authorized to initiate or to institute the winding up petition, the same is already covered by the aforesaid discussion. There is one aspect which needs to be clarified. The resolution dated 28.6.2000 conferred authority on Mr SL Jain to institute legal proceedings. Mr SL Jain signed the affidavit dated 10.7.2000 on behalf of the petitioning-creditor as its authorized signatory. However, in para 12 of the Company Petition, it was stated that he was a director of the petitioner-Company and personally aware of the facts stated in the petition and was able to depose to the same and competent to do

so. In the affidavit dated 19.10.2001, Mr SL Jain has stated that the averment that he was a director of the petitioner-Company was made through oversight and that he is the Commercial Manager of the petitioner-Company which fact is also reflected in one of the annexures to the petition and that the resolution dated 28.6.2000 passed by the Board of Directors of the petitioner-Company also did not show that Mr SL Jain was a Director of the Company. It is further stated that in the rejoinder affidavit dated 3.8.2001 he has stated that he is the Commercial Manager of the petitioner-Company. Mr Sushilkumar Jain, a Director of the petitioner-Company has also filed affidavit dated 31.10.2001 producing the resolution dated 12.10.2001 passed by the Board of Directors of the petitioner-Company clarifying the resolution dated 28.6.2000 which is already referred to hereinabove.

In any case, except for the oversight in giving the designation of Mr SL Jain in para 12 of the original Company Petition, nothing turns on the question of designation of Mr SL Jain, because it is not necessary that a winding up petition can be signed or verified only by a Director of the petitioning-creditor Company. In State Bank of India vs. The India Electric Works Ltd. (1969) 2 Comp.LJ., the Calcutta High Court has already held that it is sufficient, if the winding up petition is supported by an affidavit filed by a responsible officer (though not a principal officer of the Company) who is fully conversant with the facts. Rule 21 of the Companies (Court) Rules is merely directory.

25. In view of the above discussion, we reject both contention Nos. (i) and (ii) urged by the learned counsel for the appellant-company.

Contention No. (iii)

26. The third contention of the appellant-Company is that the duly Constituted Attorney or the Authorized Person of the petitioner Company had not signed the Company Petition, though it is mandatory, according to the form prescribed under the relevant rules. Hence the learned Judge ought not to have subsequently granted the permission to put such signature.

27. Rule 95 read with Forms 45, 46 and 47 are relevant in this behalf. Rule 95 reads as under :-

"95. Petition for winding up - A petition for

winding up a company shall be in Form No. 45, 46, 47, as the case may be, with such variations as the circumstances may require, and shall be presented in duplicate. The Registrar shall note on the petition the date of its presentation."

Form No. 46 prescribes the form for the petition for winding up by a creditor of the Company. Hence, this is the form applicable in the facts of the instant case. As per this form, the petition is supposed to have the following prayer clause and signatures :-

"The petitioner therefore prays as follows :-

(1) That the ..... Co. (Ltd.), may be wound up by the Court under the provisions of the Companies Act, 1956, and

(2) Such other order may be made in the premises as shall be just.

Advocate for the
petitioner Petitioner."

28. It is required to be noted that it is not that on the memo of the petition there was no signature on behalf of the petitioning-creditor. As per the practice of this Court in the writ jurisdiction, the petition was signed by the advocate followed by the verification on affidavit by Mr SL Jain, constituted attorney of the petitioning-creditor. Hence, the learned Company Judge rightly held that it cannot be said that the petition was without signature of the petitioning-creditor. In the case before a Division Bench of the Bombay High Court (Western India Theatres Ltd., AIR 1959 Bom.386), the Court came to the conclusion that the agent who had signed the winding up petition on behalf of the principal was not authorized by law to sign such petition, still in the course of appeal proceedings, the Court permitted the principal to sign the winding up petition. In the instant case, the constituted attorney of the petitioning-creditor had already signed the petition by verifying the contents on affidavit. Hence, the learned Company Judge was perfectly right in giving an opportunity to the petitioning-creditor i.e. to its constituted attorney to sign the petition above the verification clause also. Even going strictly by the forms under the Companies (Court) Rules, it was obviously a technical irregularity which has been rightly permitted

to be cured by the learned Company Judge. If the inherent powers of the Company Court, saved by Rule 9 of the Companies (Court) Rules, cannot be exercised in a case like this, we fail to see any other case where they could be exercised.

Contention No. (iv)

29. The last contention raised on behalf of the appellant-Company was that the affidavit filed in support of the winding up petition was not an affidavit in the eye of law or in accordance with Rule 21 of the Company (Court) Rules, 1959 (hereinafter referred to as `the Rules').

30. Rules 18 and 21 of the Companies (Court) Rules read with Form No. 3 are as under :-

18. Affidavits - (a) Every affidavit shall be drawn up in the first person and shall state the full name, age, occupation and the place of abode of the deponent. It shall be signed by the deponent and sworn to in the manner prescribed by the Code or by the rules and practice of the Court.

(b) ... ...

(c) ... ...

21. Affidavit verifying petition - Every petition shall be verified by an affidavit made by the petitioner or by one of the petitioners, where there are more than one, and in the case the petition is presented by a body corporate, by a director, secretary or other principal officer thereof; such affidavit shall be filed alongwith the petitioner and shall be in Form No. 3.

Provided that the Judge or Registrar may, for sufficient reason, grant leave to any other person duly authorized by the petitioner to make and file the affidavit."

FORM No. 3

IN THE HIGH COURT AT .....

Original Jurisdiction
In the matter of the Companies Act, 1956
and
In the matter of .....

Affidavit verifying petition

I, A.B., son of ..... aged ..... residing at ..... do, solemnly affirm and say as follows :-

1. I am a director/secretary/...../ of ..... Ltd., the petitioner in the above matter *(and am duly authorized by the said petitioner to make this affidavit on its behalf.)

[Note - This paragraph is to be included in cases where the petitioner is the company]

2. The statements made in paragraphs ..... of the petition herein now shown to me and marked with the letter `A', are true to my knowledge, and the statements made in paragraphs ..... are based on information, and I believe them to be true.

Solemnly affirmed, etc.

*Note - To be included when the affidavit is sworn to by any person other than a director, agent or secretary or other officer of the company."

31. The original verification in the instant case read as under :-

"AFFIDAVIT

I, S.L. Jain, Authorized Signatory of the petitioner Company, do hereby solemnly affirm and state on oath that what is stated in the foregoing petition is true to my knowledge, information and belief and I believe the same to be true.

Solemnly affirmed at Mumbai on this 10th day of July, 2000.

For Indo Borax & Chemicals Ltd.,

Sd/-
Deponent"

The learned Company Judge held that the defect in

the verification was only technical or curable and an opportunity was given to the deponent to cure the defect by filing a fresh petition within fifteen days. The petitioning-creditor availed of the said opportunity by filing the affidavit as per Form No.3.

32. Mr Ashwin Shah, learned counsel for the appellant-Company, however, vehemently submitted that the defect in verification was not technical and the petition was liable to be dismissed on the ground that at the time of institution of the winding up petition, it was not supported by verification on affidavit in the form prescribed by the Company Court Rules read with Form No. 3. In support of the said submission, the learned counsel heavily relied on the following decisions :-

(i) Mool Chand Wahi vs. National Paints P.Ltd. (1986) 60 Company Cases 198 (Single Judge).

(ii) Mool Chand Wahi vs. National Paints P.Ltd. (1986) 60 Company Cases 402 (Division Bench).

(iii) Palitana Sugam Mills Pvt. Ltd. vs. State (2000) 3 GLR 2066

(iv) Vasantbala H Mehta vs. Dolaut High School, (1998) 3 GLR 1849.

33. Against the above submission for the appellant-Company, Mr AS Vakil for the petitioning-creditor relied on the following decisions in support of his contention that even if the affidavit originally filed with the winding up petition is not as per rule 21 and Form 3, still the Court can in its inherent power allow the petitioner to present a fresh affidavit in support of his petition in terms of the prescribed Rule and Form. In other words, even if there is some slight defect or irregularity in the filing of the affidavit, the appellant ought to be given an opportunity to rectify the same :-

(i) Malhotra Steel Syndicate vs. Punjab Chemi-Plants Ltd., (1989) 65 Company Cases 546 (P&H) (Single Judge)

(ii) Malhotra Steel Syndicate vs. Punjab Chemi-Plants Ltd., 1993(3) SCC 565.

(iii) DLF Industries Ltd.vs. Essar Steel Ltd.,

(1999) 2 Comp.LJ 310 (Guj.)

(iv) Roma Deb vs. RC Sood and Co. (P) Ltd.,
(1987) 2 Comp.LJ 174 (Del.)

34. We find considerable substance in the contention of Mr Vakil for the petitioning-creditor. The preponderance of judicial authority is that the defect in the form of verification or affidavit is only a technical irregularity and that an opportunity should be given to the concerned party to cure such defect. The inherent powers of the Court saved by Rule 9 of Companies (Court) Rules, can certainly be invoked in such cases. Rule 9 reads as under :-

"9. Inherent powers of Court.- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

35. In Malhotra Steel Syndicate vs. Punjab Chemi-Plants Ltd., (1989) 65 Company Cases 546, Justice Majithia referred to the Division Bench Judgement of the Punjab & Haryana High Court in Mool Chand Wahi vs. National Paints (Pvt.) Ltd., (1986) 60 Company Cases 198 and made the following observations :-

"Sitting singly, I am bound by this judgment, although, I have got serious doubts about the correctness of the observations made in the judgment that the petition is liable to be rejected on the sole ground that the affidavit accompanying the petition is not verified according to law. It was a mere irregularity and the company court could direct the petitioner to file a fresh affidavit in conformity with rule 21 of the Companies (Court) Rules, and an irregularity could be cured but not an illegality. Imperfect verification of the affidavit is only an irregularity and not an illegality of a type which will entail dismissal of the company petition. Affidavits are not "evidence" within the meaning of section 3 of the Evidence Act and can be used as evidence only if, for sufficient reasons the Court passes an order under Order 19, rule 1 or 2 of the Code of Civil Procedure. Reference can be made to Smt. Sudha Devi vs. M.P. Narayanan (1988) 3 SCC 366. I

had thought of making a request to my Lord the Chief Justice for referring the case to a larger Bench for reconsideration of the judgment rendered by the Division Bench in Mool Chand Wahi v. National Paints (Private) Ltd., (1986) 60 Company Cas. 402 (P&H). However, in view of my decision on the merits of the controversy, I do not think it proper to make such a request. This matter will be gone into in another appropriate case."

The aforesaid decision was ultimately carried before the Supreme Court and in the decision reported at 1993 (3) SCC 565 (Malhotra Steel Syndicate vs. Punjab Chemi-Plants Ltd.), the Supreme Court passed the following order :-

"We have looked at the form and verification of the affidavit filed before the High Court in support of the application for winding up. We are satisfied that the verification, on a proper and liberal construction, does contain an averment to the effect that the statements made in the affidavit are true and correct to the knowledge of the appellant. We do not think that the affidavit can be described as defective in any respect. But that apart, we are of the opinion that even if there is some slight defect or irregularity in the filing of the affidavit, the appellant should have been given an opportunity to rectify the same.

3. We are, therefore, of the opinion that the Division Bench was in error in dismissing the appeal on the short ground that the affidavit filed in support of the petition was not in proper form and that the petition could not be entertained. We, therefore, set aside the order of the Division bench dated August 21, 1991."

(emphasis supplied)

With this pronouncement, the decisions of the learned Single Judge as well as Division Bench of the Punjab & Haryana High Court in Mool Chand Wahi's case (Supra) must be treated as having been impliedly overruled.

36. Following the aforesaid Supreme Court decision,

this Court has also held in DLF Industries Ltd. vs. Essar Steel Ltd., (1999) 2 Comp.LJ 310 (Guj) that the importance of verification in an affidavit in Form No. 3 under rule 21 of the Companies (Court) Rules, 1959, is to test the genuineness and authenticity of the allegations and also to make the deponent responsible therefor. In essence, the verification is required to enable the court to find out whether it will be safe to act on such affidavit. `Pedantic and strict adherence to the mere forms cannot be a principle on which company law has to be administered'.

37. In Roma Deb vs. RC Sood and Co.(P) Ltd., (1987) 2 Comp.LJ 174 (Del), speaking for the Delhi High Court Hon'ble Mr Justice D.P. Wadhwa (as His Lordship then was) also expressed the same view that the Court can, in its inherent powers, allow the petitioners to present an affidavit in support of the petition in terms of the prescribed Rules and Forms, if the affidavit originally filed with the petition does not conform to them. Of course, this the Court would do in the ends of justice; and if the circumstances of the case require.

38. Reliance placed by Mr Ashwin Lalbhai on the decisions of this Court in Palitana Sugar Mills Pvt. Ltd. vs. State (2000) 3 GLR 2066 and Vasantbala H Mehta vs. Dolaut High School (1998) 3 GLR 1849 is misconceived.

In the former case the verification of affidavit by one of the respondents was found to be wholly defective, because it merely said - "Solemnly affirmed on this 29th November, 1999 at Ahmedabad" without showing what was affirmed. The Court treated it as a paper disclosing the stand of the concerned respondent and not as an affidavit.

In the other decision, this Court deprecated the practice of filing vague affidavits, but did not hold that the defect in filing affidavit can never be permitted to be cured. In that case, the petitioner incurred wrath of the Court on account of suppression of material fact about dismissal of the previous petition on the same subject matter.

39. As regards the contention of Mr Ashwin Lalbhai that even if a fresh affidavit with proper verification in accordance with Rule 3 was permissible, the winding up petition can be said to have been instituted on the date on which such fresh affidavit is filed, we are unable to accept this contention for the reasons which also

commended to the Delhi High Court in the aforesaid case of Roma Deb (Supra) wherein Hon'ble Mr Justice DP Wadhwa observed that dating back of the petition under various circumstances is not something new to the law. If the effect of permitting an act is to relate back the petition, otherwise initially defective, to its original date of filing, this can be permitted in the ends of justice; and the Court will see if any prejudice is being caused to the other party which may be compensated by cots or otherwise. A balance has to be struck between two warring parties. If amendment of the petition can be allowed, there does not seem to be any reason as to why a defective affidavit verifying the petition cannot be rectified. The Court is not helpless in a case where the affidavit verifying the petition is not in the prescribed form. In the case of verification to the plaint, it is now settled that a defect in verification is only an irregularity in procedure and will not be a ground for rejecting the plaint and that could be cured at any stage of the suit. The Court will not, however, permit the rectification of the defect in a winding-up petition just as a matter of course; but would take into account all the relevant circumstances including the conduct of the parties.

40. In the instant case, we do not find any infirmity in the order of the learned Company Judge permitting the petitioning-creditor to rectify the defect in the verification on affidavit filed with the Company Petition. The effect of permitting such rectification is, inter alia, to relate it back to the original date of filing of the winding up petition and this has been permitted in the interests of justice. No prejudice is caused to the appellant-Company by such permission granted by the learned Company Judge.

41. For the aforesaid reasons, we reject contention No. 4 also.

42. As regards the last contention i.e. contention No. 5 which was urged before the learned Company Judge as a preliminary contention, the same merely requested the Court to decide the preliminary objections. Since those objections have been overruled by the learned Company Judge and we have confirmed the view of the learned Company Judge, the winding up petition will now have to proceed on merits.

43. In view of the above discussion, we do not see any merit in any of the contentions raised on behalf of

the appellant Company. We are of the view that the orders passed by the learned Company Judge granting opportunity to the petitioning-creditor (the respondent herein) to cure the defects regarding signature on the petition and the form of affidavit were merely procedural orders. As regards the order of the learned Company Judge holding that the resolution dated 28.6.2000 conferred sufficient authority on the constituted attorney to file the winding up petition may also prima facie appear to be a procedural order. But, adopting the reasoning of the Division Bench of the Bombay High Court in para 5 of the judgment in Western India Theatres Ltd., AIR 1959 Bom. 386, that if the preliminary objection of the respondent-Company (appellant herein) had been upheld by the learned Company Judge, the petition could have been dismissed in absence of any further resolution passed by the Board of Directors of the petitioning-creditor before the date on which the learned Company Judge passed the order under appeal, we have proceeded on the footing that the appeal is maintainable.

44. We dismiss the appeal by rejecting all the four contentions urged on behalf of the appellant Company. The winding up petition shall now proceed for hearing on merits before the learned Company Judge.

The appeal is accordingly dismissed. However, there will be no order as to costs because although the oversights on the part of the respondent Company and its officer did not require them to suffer on merits, they must at least suffer their own costs of this appeal.

(M.S. Shah, J.)

(D.A. Mehta, J.)

At this stage, the learned counsel for the appellant-Company makes a request for staying the operation of this judgment in order to have further recourse in accordance with law.

Since we have only dismissed the appeal against the order of the learned Company Judge rejecting the preliminary contentions of the appellant-Company against maintainability of winding up petition which is pending before the learned Company Judge since September, 2000, we see no reason to grant any stay of operation of this judgment. The request is therefore rejected.

(M.S. Shah, J.)

(D.A. Mehta, J.)

sundar/-